

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**207 GENESEE STREET**  
**UTICA, NEW YORK 13501**

**In the Matter**

**- of -**

**the Application of Michael J. Lane Construction, Inc.**  
**for Recertification as a Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 1721079**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**September 6, 2024**

This matter considers the written appeal by Michael J. Lane Construction, Inc. (“MJLC” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for recertification as a woman-owned business enterprise (“WBE”).

### **PROCEDURAL HISTORY**

1. On March 21, 2023, Ms. Nancy Hughes, as President, applied on behalf of MJLC for recertification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 4, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
  - (a) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
  - (b) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2); and
  - (c) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).
3. MJLC timely filed a Request to Appeal on November 1, 2023 (DED Exhibit 3).

4. A notice to proceed via written appeal was sent to MJLC on November 1, 2023 (DED Exhibit 4).
5. MJLC filed its written appeal by letter dated December 7, 2023, with attachments, from its attorney, M. Tracey Brooks, Esq. of Shenker Russo & Clark LLP (APP Exhibit F).
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated March 13, 2024, and a brief of Michael Paff, Esq., counsel for the Division, dated March 14, 2024.
7. After the papers were submitted additional discussions took place between the parties. Thereafter, the Administrative Hearings Unit began their review.

### **FINDINGS OF FACT**

8. MJLC is engaged in the business of home improvement for residential/commercial services in the construction field (DED Exhibit 1).
9. Ms. Nancy Hughes is President and has a 51% ownership interest. Mr. Michael Lane is Vice President and has a 49% ownership interest (DED Exhibit 1).
10. Nancy Hughes' resume reflects that she has over 40 years of experience in business administration for private and commercial industries. Her experience includes negotiation of contracts, accounting, maintenance of general office procedures and scheduling of work with trades (DED Exhibit 1). Her duties at MJLC include: reviewing of NYS Reporter daily; soliciting applicable prospect projects; negotiating with engineer firm contract; scheduling job based on prime contractor; making travel arrangements/lodging; employee payroll; workers compensations and liability insurance; accounts payable/receivable (DED Exhibit 6).
11. Mr. Michael Lane's resume reflects that he holds a 30-hour OSHA Certification, a Contractor's License for Engineering Service in Hudson Valley HCS, and a Binghamton

NY DOT for NICET Level II. His concentration is in water treatment and Waste Water Treatment Projects. He has experience in water and sewer projects, road drainage, and catch basins and works with heavy road construction, simpson, gang forms, retaining walls, parapet walls and curbs, rad bed wood and metal decking, parking lot drainage, catch basin and curbing (DED Exhibit 7). He is employed on a contract basis at MJLC as a construction inspector. His duties include: being the owner and engineers representative on the job site; reviewing all construction and materials to determine compliance with contract documents; attending monthly progress meetings, substantial completion, and final inspections; assisting the Rural Development representative during monthly site visits; and observing testing and/or disinfection of all lines and records results in daily inspection reports (DED Exhibit 8).

12. The By-Laws dated October 21, 2021 state (a) MJLC is managed by its Board of Directors; (b) the number of Directors may be less than three but not fewer than the number of shareholders; (c) to constitute a quorum, a majority of the entire Board is required; (d) each Director shall be entitled to one vote and a majority of votes is required for the Board to act; (e) the Board may elect a President, Vice Presidents, Secretary and Treasurer; and (f) the President shall be the Chief Executive Officer. (DED Exhibit 9).

### **APPLICABLE LAW**

5 NYCRR §144.2(c) states in relevant part as follows:

Operation. Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
  - (i) The products or services the business enterprise provides to clients; and
  - (ii) The means by which the business enterprise obtains contracts or orders.

5 NYCRR §144.2(d)(1) states as follows:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by MJLC for recertification as a WBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain

previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

## **DISCUSSION**

### I. Prior Certification

The Division acknowledges that MJLC was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify MJLC based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, MJLC had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR former §144.2 when it submitted the March 21, 2023, application and supporting materials and cannot rely on the past determinations of the Division.

### II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that “this requirement cannot be satisfied by expertise or experience in office management or general

business administration, among other things”. In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Certification is denied where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. *Matter of Panko Electrical and Maintenance Corp. v. Zapata et al*, 172 AD 3d 1682 (3d Dept. 2019).

Nancy Hughes’ resume reflects that she has over 40 years of experience in business administration for private and commercial industries. Her experience includes negotiation of contracts, accounting, maintenance of general office procedures and scheduling of work with trades (DED Exhibit 1). Her duties at MJLC include: reviewing of NYS Reporter daily; soliciting applicable prospect projects; negotiating with engineer firm contract; scheduling job based on prime contractor; making travel arrangements/lodging; employee payroll; workers compensations and liability insurance; accounts payable/receivable (DED Exhibit 6). These duties are primarily administrative in nature and do not indicate direct work experience in the critical functions of the business. The critical functions of the business are commercial and residential home improvement/remodeling services and engineering services (DED Exhibit 1). Ms. Hughes does not have the training or experience to make her qualified to supervise the work of her employees.

Mr. Michael Lane’s resume reflects that he holds a 30-hour OSHA Certification, a Contractor’s License for Engineering Service in Hudson Valley HCS, and a Binghamton NY DOT for NICET Level II. His concentration is in water treatment and Waste Water Treatment Projects.

He has experience in water and sewer projects, road drainage, and catch basins and works with heavy road construction, simpson, gang forms, retaining walls, parapet walls and curbs, rad bed wood and metal decking, parking lot drainage, catch basin and curbing (DED Exhibit 7). He is employed on a contract basis at MJLC as a construction inspector. His duties include: being the owner and engineers representative on the job site; reviewing all construction and materials to determine compliance with contract documents; attending monthly progress meetings, substantial completion, and final inspections; assisting the Rural Development representative during monthly site visits; and observing testing and/or disinfection of all lines and records results in daily inspection reports. He is a “Hands on Project Manager” and “Construction Inspector” with extensive experience in residential and commercial projects including municipalities throughout New York State (DED Exhibit 8).

Where the non-eligible family members have the education and expertise to perform the specialized work and the owner spouse relied upon for certification handles the administrative aspects; the business is considered a family-owned business, which does not meet the criteria for WBE certification. *Matter of Occupational Safety & Environmental Assoc., Inc.*, Recommended Order dated April 12, 2017, Final Order 17-27, dated April 17, 2017.

There is no evidence in the record to show that Nancy Hughes possesses adequate, industry-specific competence to make critical business decisions without relying on Michael Lane (DED Exhibits 1, 5, 6, 7 and 8).

5 NYCRR §144.2(c)(2) states that “Women or minority group members... relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors but is not



limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”.

The minority/woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4<sup>th</sup> Dept. 2018).

Applicant argues on appeal that it is not customary for those with operational control and decision-making authority in a construction enterprise to also complete most of the hard-hat work carried on by the business (APP Exhibit F). However, the day-to-day decisions must be operational decisions, not just administrative decisions. See *Matter of Park Sales & Service, Inc.*, Recommended Order dated September 25, 2023, Final Order 23-10, dated October 13, 2023. The critical functions of the business are commercial and residential home improvement/ remodeling services and engineering services (DED Exhibit 1). Ms. Hughes’ resume does not reflect any experience in performing these functions (DED Exhibit 6).

The Division’s determination to deny the application on the basis that MJLC failed to demonstrate that Nancy Hughes possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2), is supported by substantial evidence.

### III. Control

The Division also denied certification on the ground that Nancy Hughes is not the highest-ranking officer and does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

The By-Laws dated October 21, 2021 state (a) MJLC is managed by its Board of Directors; (b) the number of Directors may be less than three but not fewer than the number of shareholders; (c) to constitute a quorum, a majority of the entire Board is required; (d) each Director shall be entitled to one vote and a majority of votes is required for the Board to act; (e) the Board may elect a President, Vice Presidents, Secretary and Treasurer; and (f) the President shall be the Chief Executive Officer. (DED Exhibit 9).

On appeal, applicant submitted Amendment to the By-laws dated December 7, 2023, which gives the President the tie-breaking vote. However, this is new information that was not before the Division at the time of the denial determination and is not clarifying, thus is not now being considered in accord with 5 NYCRR §145.2(b)(1) and *Scherzi Systems, LLC v. White, supra*. (APP Exhibit A)

Since both Directors are required to be present in order to constitute a quorum, and each Director is entitled to one vote, Nancy Hughes does not individually have control of MJLC's Board of Directors.

The Division's determination to deny the application on the basis that Nancy Hughes does not control MJLC's board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

### **CONCLUSION**

MJLC did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(c)(1), 144.2(c)(2), and 144.2(d)(1) was not based on substantial evidence.

## **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny MJLC's application for recertification as a woman-owned business enterprise.

In the Matter of Michael J. Lane Construction, Inc.  
 DED File ID No. 1721079  
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Resume of Nancy Hughes	Y	Y
APP B	Executive Bio President of MJLC	Y	Y
APP C	Amendment to Corporate Bylaws of MJLC	Y	Y
APP D	Original Bylaws of MJLC	Y	Y
APP E	Letter from Cedarwood Engineering Services PLLC	Y	Y
APP F	Written Appeal of MJLC	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Resume of Nancy Hughes	Y	Y
DED 6	Narrative of Nancy Hughes	Y	Y
DED 7	Resume of Michael Lane	Y	Y
DED 8	Narrative of Michael Lane	Y	Y
DED 9	Bylaws of MJLC	Y	Y
DED 10	Cedarwood Contract	Y	Y
DED 11	MJLC Meeting Minutes	Y	Y